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U.S. DISTRICT COURT  
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LORETTA G. WHYTE  
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

|        |                        |                   |
|--------|------------------------|-------------------|
| IN RE: | EDUCATIONAL TESTING    | MDL NO: 1643      |
|        | SERVICE PRAXIS         |                   |
|        | PRINCIPLES OF LEARNING | SECTION: R(5)     |
|        | AND TEACHING: GRADES   |                   |
|        | 7-12 LITIGATION        | JUDGE VANCE       |
|        |                        | MAG. JUDGE CHASEZ |

THIS DOCUMENT RELATES TO ALL CASES

PLAINTIFFS' ADMINISTRATIVE MASTER COMPLAINT

INTRODUCTION

1. Plaintiffs submit this Administrative Master Complaint (hereinafter "AMC") pursuant to the Court's Pretrial Order No. 2, paragraph 3, entered on January 24, 2005.
2. This AMC is purely an administrative device to streamline pleadings and motion practice, and is done solely for the convenience of the Court and the parties.
3. This AMC shall not affect any substantive or legal rights and does not supplant or supercede any complaint subject to these Multidistrict litigation ("MDL") proceedings. This AMC incorporates all parties subject to this MDL proceeding, including those named in any and all subsequently-filed "tag-along" actions which are transferred to this Court. See Exhibit A attached hereto for a list of all actions subject to this MDL proceeding.

Fee \_\_\_\_\_  
Process \_\_\_\_\_  
X Dkt'd \_\_\_\_\_  
Ct. Rm Dep \_\_\_\_\_  
Dec. No \_\_\_\_\_

4. This AMC does not merge the above-referenced suits into a single cause, or alter the rights of any party in any respect. The filing of this AMC shall have no effect on applicable choice-of-law principles or on the subsequent remand of the cases back to their respective transferor courts.

5. This AMC shall not be given the same effect as an ordinary complaint, but shall only be considered as an administrative device to aid efficiency and economy. In re: Propulsid Products Liability, 208 F.R.D. 133, E.D. La. 2002 (June 4, 2002).

### **JURISDICTION AND VENUE**

6. As to those actions originally filed in this District, the jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1332(a)(1). As to those actions transferred to this Court, the jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1331, 1332(a)(1), 1337(a), 1367(a), 1407, and pursuant to principles of supplemental jurisdiction. All parties whose claims were removed from state court and transferred to this Court pursuant to 28 U.S.C. §1407 reserve any and all rights to seek remand and contest federal jurisdiction. Inclusion in this AMC is not a waiver of an objection to, or consent to, federal jurisdiction where such jurisdiction is otherwise lacking.

7. As to those actions originally filed in this District, venue properly lies in this Judicial District pursuant to 28 U.S.C. §1391 because the cause of action arose in this District, ETS transacts a substantial amount of business in this District, and a substantial portion of the affected interstate trade and commerce described below has been carried out in this District. As to those actions transferred to this District, venue properly lies in this Judicial District pursuant to 28 U.S.C. §1407 and 15 U.S.C. §§15, 22, and 26.

### **THE PARTIES**

8. Plaintiffs, individually and/or on behalf of all those similarly situated putative Class Members, include all named Plaintiffs and all those similarly situated putative Class Members in each and every action which has been or will be transferred to this Court pursuant to the MDL proceedings (herein referred to as "Plaintiffs").

9. Defendant Educational Testing Service ("ETS") is a non-profit corporation organized under the New York Education Law, with its principal place of business located at Rosedale Road, Princeton, New Jersey, 08541-0001. ETS regularly conducts business in the Eastern District of Louisiana and throughout the United States.

### **FACTUAL ALLEGATIONS RELATING TO ALL LEGAL CLAIMS**

10. Many states require that a teacher be certified or licensed in order to be qualified to teach. Without certification, persons cannot obtain teaching jobs.

11. Certification requires passing various tests. The particular tests to be taken depend on a person's particular field of study.

12. ETS is a corporation that administers such tests. ETS is the world's largest private educational testing organization. Annually, it administers more than 12 million tests worldwide.

13. The test at issue in this action is the Praxis Principles of Learning and Teaching Grades 7 through 12 ("Praxis") test. States use this test as a part of the teaching certification and endorsement process. The Praxis Series is also relevant to colleges and universities and a number of professional associations and organizations as a measure of teaching credentials. This test is designed to assess a beginning teacher's knowledge of a variety of material relevant to teaching students in grades 7 through 12. ETS designed, administered, conducted, and scored the Praxis test.

14. Numerous states across the country require persons interested in teaching to take and pass the Praxis test. Without a passing score on this test, persons cannot obtain professional certification as a teacher, and thus, cannot obtain employment as teachers. Nineteen states (Arkansas, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Missouri, Mississippi, Nevada, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, and West Virginia) contracted with ETS to administer the Praxis test from January 2003 through April 2004.

15. As a precondition to taking the Praxis exam, ETS required each test taker to agree in writing to the conditions set forth by ETS in its Registration Booklet. Unless the applicant signed his or her agreement, the applicant could not take the exam. The terms of the Registration Booklet were standard form and non-negotiable. No test taker could refuse the terms of the Registration Booklet and contract with another party to administer and score the Praxis as no other alternative testing service exists.

16. The contracts between ETS and each member of the Class, including Plaintiffs, are identical in every respect.

17. The contracts are contracts of adhesion and were unilateral.

18. The Plaintiffs and Class members were unable to protect themselves from ETS's non-performance of the contracts or breach of the contracts.

19. The contracts were drafted by ETS, and Plaintiffs and Class members had no bargaining power to negotiate any of the terms of the contracts or ETS's duties and obligations.

20. ETS represented to the public that it had procedures in place to ensure its correct scoring of the exams, and to ensure that, if scoring errors occur, they will be detected promptly, and they will not reoccur.

21. On ETS's website, under the heading of "Commitment to Fairness and Equity in Testing," ETS states: "[T]he ETS Office of Corporate Quality Assurance conducts periodic audits of each ETS testing program to ensure adherence to the ETS Standards of Quality and Fairness." Also, under the heading of "Statisticians and Psychometricians," ETS represents "Reliability assures that test takers will receive similar scores no matter which version of an ETS test they take . . . . Our standards for test performance, maintained by exacting statistical and psychometric research, are the most rigorous in the field." Finally, in a marketing pamphlet distributed by ETS entitled "Questions to Ask about Teacher Testing Programs," ETS represents: "Test reliability is established and monitored through test development and statistical processes."

22. Despite such statements, ETS has publicly admitted that it has incorrectly scored short essay questions on at least nine Praxis test administrations.

23. Approximately 40,000 teacher candidates took the test during nine administrations between January 2003 and April 2004. All test takers' scores were too stringently graded and thus, they received grades lower than the accurate grades they should have received had ETS graded the test correctly.

24. At the time the tests were taken, ETS informed at least 4,100 persons who took the Praxis test during the period of January 2003 through April 2004 that they failed the test, despite the fact that they had actually passed the test, and informed approximately 36,000 who took the Praxis test during that same period that they received lower grades than actually earned.

25. Only after a client State questioned ETS's scoring results did ETS begin an investigation.

26. According to ETS, the numbers of test takers who received false failure scores in certain states are as follows: Ohio – 1,231; Pennsylvania – 562; Louisiana – 486; Tennessee - 308; South Carolina – 150; Kentucky – 150; Nevada – 119; Hawaii – 75; and Texas – 34. The remainder of those class members who received falsely failing scores were from the other 10 states who used the test.

27. Upon receiving failing scores, numerous Plaintiffs and Class members paid fees to ETS in order to have ETS re-score their examinations. Despite collecting substantial fees and after purportedly re-scoring the examinations, ETS continued to provide Plaintiffs and Class members with erroneous failing scores.

28. These erroneous scores were reported by ETS to the states and to institutions. The reported scores did not properly or accurately depict the Plaintiffs and Class members actual scores, but assigned lower and oftentimes failing scores to Plaintiffs and Class members, thus diminishing their professional standings and reputations.

29. Some one and one-half years after the erroneous scoring occurred, ETS admitted scoring nine administrations of tests incorrectly, but only to those who falsely received failing scores. On or about July 10, 2004, ETS began notifying some Plaintiffs and Class members by telephone, and later by letter, that ETS had incorrectly scored their tests, that ETS had re-scored the tests, and that some Plaintiffs and Class members had actually passed the tests. ETS sent form letters that read, in pertinent part:

I am writing to inform you that ETS has re-scored your Principles of Teaching and Learning: 7-12 test and that you have achieved a passing score in one or more of the states that you designated as a score recipient... A copy of your corrected score report is enclosed, and, we will soon mail your revised report to the states you requested. If you took the PLT: 7-12 test multiple times between January 2003 and April 2004, then your scores for each test have been re-scored and corrected reports are enclosed for any tests when your passing status changed. (emphasis added).

30. ETS reported that the specific flaw in scoring related to grading the constructed response (short-answer essay) portion of the Praxis tests. According to ETS, test-graders were “grading more stringently than they should have been.”

31. ETS owes a duty of good faith and fair dealing to test takers to accurately grade the tests.

32. ETS’s actions have prevented some Plaintiffs and Class members from receiving or timely receiving their professional credentials, and thus, have prevented them from retaining or obtaining employment as certified teachers. For example, many lost teaching positions, many were denied employment as certified teachers, and many did not pursue teaching positions, as to do so would have been futile. This loss of employment and employment opportunities has caused, inter alia, a loss of income, benefits, seniority, tenure, and emotional distress. As a result, Plaintiffs and Class members have been damaged.

33. ETS’s actions delayed the graduation from Bachelor’s or Master’s degree programs for some Plaintiffs and Class members, and/or caused some Plaintiffs and Class members to pursue alternative majors. As a result, some Plaintiffs and Class members were prevented from participating in their respective school’s graduation ceremonies, have lost wages and job benefits

as a result of their delay in entering the job market, and have incurred additional tuition expenses as well as other expenses associated with remaining in school longer than planned.

34. ETS's actions also caused some Plaintiffs and Class members to incur costs relating to, inter alia, taking the tests on multiple occasions, paying late registration fees, paying for tests re-scoring, obtaining advance verbal scores on the tests for a fee, paying for diagnostic evaluations to understand why they failed, purchasing study guides to assist in future tests, incurring travel related expenses to take the tests out of town, and performing additional course work. Some Plaintiffs and Class members also lost wages as a result of taking time away from work so that they could prepare for, take, and re-take the Praxis exam.

35. ETS's actions also caused some Plaintiffs and Class members who were notified that they passed the Praxis tests to have artificially low scores reported to states and institutions. These scores may be used by prospective employers to differentiate between or rank job applicants, as well as by graduate programs for admission purposes.

36. Additionally, some Plaintiffs and Class members who were given a passing, yet incorrect score, may be barred from certification as a teacher in a state other than the one in which they were initially certified. For instance, if a test taker is deemed to have passed Praxis with a score of 155 for certification in Mississippi, ETS did not re-score the test although the original score was done in error. ETS only re-scored those tests when test takers would not be certified in any state for which they had the results sent. Should the test taker with the score (albeit an incorrect lower score) sufficient for certification in Mississippi, desire to move to a state requiring a threshold score of 156 for certification, the test taker would not be eligible for certification and endorsement. It is evident the scoring error has consequences for even those Plaintiffs and Class members who passed the test

in one state as the lower and erroneous score may prevent certification in a state mandating a higher threshold score for certification. In this instance, the Plaintiffs and Class members would have to re-take the Praxis test and pay all associated fees. In this highly mobile society, re-location to another state is commonplace and ETS's failure to re-score all tests affected by its error limits the ability of the teachers to gain employment in any state with a higher certification score threshold.

37. Finally, given the devastating effects on their careers, some Plaintiffs and many Class members experienced personal injuries, including serious and severe emotional distress, mental anguish, embarrassment, aggravation, and humiliation, as a result of ETS's actions. Many have sought medical and psychological assistance for these problems and thus have incurred medical and medical-related expenses.

38. ETS's contracts with Plaintiffs and Class members were, by their nature, intended in part to gratify a non-pecuniary interest of the Plaintiffs and Class members, and because of the circumstances surrounding the formation and breach of the contracts, ETS knew or, at the very least, should have known that its breach would cause non-pecuniary losses to the Plaintiffs and Class members, and the Plaintiffs and Class members are entitled to recover those losses.

**FACTUAL ALLEGATIONS RELATING SPECIFICALLY  
AND ONLY TO THE ANTITRUST CLAIM**

**A. ETS Has a Monopoly**

39. ETS touts itself as the "world's largest private education testing and measurement organization." Founded as a non-profit corporation in 1947, it remains a non-profit, but has acquired or maintained for-profit subsidiaries. ETS, as described by its President, is currently "a billion dollar commercial entity." It has changed from an entity staffed primarily by academics to one run by

former corporate executives. Its president, Kurt Landgraf, was a former chief operating officer of the Dupont Company. Under his leadership, executive salaries have soared. Mr. Landgraf received close to \$800,000 for his first ten months on the job, about twice as much as heads of comparable organizations. Fifteen ETS officers received bonuses totaling \$2 million in the fiscal year ending June 2001. In that same fiscal year, ETS had revenues of more than \$700 million and an operating surplus of \$34 million. These large salaries, revenues and profits flow from the monopoly power ETS possesses with respect to many of its products and services. One of the monopolies ETS enjoys is in the market of teacher certification testing. Many states require testing for teacher certification. Nearly 80 percent of the states that include tests as part of their teacher licensure process require the Praxis tests administered and scored by ETS. The Praxis series tests are currently required for teacher licensure in 39 states and U.S. jurisdictions. The Praxis assessments are currently offered at six administrations during the year, at 650 test centers in all 50 states. ETS has only two, much smaller, competitors in teacher certification testing -- National Evaluation Systems and ABCTE, both of which operate in only a handful of states.

40. There are formidable barriers to entry in the teacher certification testing market. First, there are high capital costs. Second, ETS enjoys a "network effect" from its historical operations -- the more people take the Praxis tests, the more likely it is that states, seeking to recruit teachers, will use the Praxis tests for certification; the more states use the Praxis tests for certification, the more people will take the Praxis tests. Test scores are portable to any of the 38 states that require one or more of the assessments, thus enhancing the states' recruitment efforts. Third, there are regulatory barriers -- potential entrants must convince state legislatures to adopt their test for certification. ETS has been actively lobbying various governmental entities for years, and has an

established ability in the field. In January 2005, ETS created a position of “Vice President, Government Relations,” stating that it was stepping up its efforts to influence state and federal policies. Fourth, ETS can claim that its tests have been “validated” over the years, while a potential entrant cannot do so. These and other barriers to entry effectively foreclose competition for ETS in teacher certification testing.

**B. ETS Has Engaged in Unlawful Monopolization**

41. ETS’s business activities with respect to Praxis testing are within the flow of and substantially affect interstate trade and commerce. ETS enjoys monopoly power – the power to control price or exclude competition – with its Praxis testing. The relevant product market within which ETS competes is teacher certification testing; the relevant geographic market is the United States (together, the “Relevant Market”).

42. ETS unlawfully abused its monopoly power in the Relevant Market by, inter alia: a) refusing to provide Antitrust Class Members with detailed information regarding their completed Praxis tests; and b) failing to provide test results to Antitrust Class members in time to avoid late fees for those who failed and desired to retake the test at the next available opportunity.

43. Separate Relevant Markets exist, with separate competitors, with respect to ancillary products and services relating to Praxis tests. The relevant geographic market for these products and services is the United States. The relevant products include, for example, Praxis test preparation guides and Praxis test review courses. ETS competes in these markets.

44. ETS refuses to disclose historical testing and response information to persons who have taken the Praxis tests. The Praxis Bulletin states: “Your test books and answer sheets are not available for disclosure.” This practice places the test-taker at the mercy of ETS. If the test-taker

does not accept the initial results provided by ETS, “score verification” is available for an additional charge between \$40-\$80. But this still does not give any detailed information regarding the test, and allows for abuses such as repeated incorrect scoring.

45. While ETS refuses to disclose specific test books and answer sheets to anyone outside of ETS, it uses the information itself in its test preparation and test review products and services. In particular, beginning with the September 13, 2003 test administration, individuals who did not receive a passing score on any of the Praxis tests could order from ETS a “Diagnostic Preparation Program,” and receive detailed, customized feedback about their test performance. The cost ranges from \$75 (multiple-choice test) to \$175 (combined multiple-choice and constructed-response test). ETS forwards to test takers its advertisement for the Diagnostic Preparation Program together with the Praxis test scores.

46. The ability of ETS to access and use specific test questions and answers, while precluding the ability of test takers and competitors to do the same, is an unlawful use of ETS’s monopoly power in the Relevant Market. In addition, it is an unlawful leveraging of ETS’s monopoly power in the Relevant Market into ancillary product and services markets.

47. Another abuse of ETS’s monopoly power in the Relevant Market is its practice of charging a \$40 “late registration” fee to test takers who desire to retake a failed Praxis test at the next available testing date. ETS scores tests and sets the timetable to notify test-takers of their scores. Notification of test scores takes place approximately one month after the test, but after the cut-off date to apply for the next Praxis test without payment of a “late registration” fee. For example, if a Class member took a Praxis test on December 7, 2004, that Class member was notified as to whether he or she passed by mail sent out “approximately” on February 8, 2005. The next Praxis

test date is March 5, 2005, seemingly giving the Class member time to retake the test if the Class member failed. The regular registration deadline for the March 5<sup>th</sup> test is February 1, 2005, and the “late registration” date is February 8, 2005. So, despite the fact that all necessary background registration material was already processed for the earlier test, a failing applicant must pay a “late fee” to take the next available test. In some cases, a late fee can be avoided through ETS’s “scores-by-phone” service, but at an additional cost of \$25.

48. Beginning in April 2004, ETS changed its policy so that candidates who register for a test before knowing the results of a prior test will automatically receive a refund of their registration, test, and surcharge fees if they receive a passing score for the prior test. In order to receive a refund, the test codes must be the same on each registration. This does not aid test takers prior to April 2004, or test takers after April 2004 who were unaware of the change in policy. It also requires test takers to anticipate failure and front additional monies, to be refunded at a much later date. There is no legitimate reason why ETS cannot simply waive “late fees” for those re-registering for a failed Praxis test.

**CLASS ACTION ALLEGATIONS FOR ALL  
LEGAL CLAIMS EXCEPT ANTITRUST CLAIM**

49. For the legal claims other than the antitrust claim, Plaintiffs bring this class action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, individually and on behalf of all members of the following class (the “Class”):

All persons in the United States who took the Praxis Principles of Learning and Teaching for Grades 7 through 12 test administered by ETS during the period of January 1, 2003 through April 2004, whose scores were affected by a scoring error and who were damaged by the scoring error.

50. The Class is numerous and joinder of all members is impracticable. ETS acknowledges that at least 4,100 persons in nineteen states passed the test, but were falsely told that they had failed, making this a class action with a minimum of 4,100 members. The exact number and identities of the members of the Class are currently unknown to Plaintiffs but are known by ETS and can be easily ascertained. Approximately 40,000 teacher candidates sat for a Praxis exam which was incorrectly scored between January 2003 and April 2004. Their scores were too stringently graded and thus, erroneous. These erroneous scores were reported to them, their universities and their states, and were never corrected by ETS.

51. There are questions of law and fact common to the Class. The most significant questions common to the Class, which predominate over all other issues present in this case, are:

- a. Whether ETS incorrectly scored the Praxis tests;
- b. How ETS incorrectly scored the Praxis tests;
- c. Why ETS incorrectly scored the Praxis tests;
- d. Whether ETS provided Plaintiffs and Class members with erroneous failing test scores;
- e. Whether ETS incorrectly reported Plaintiffs' and Class members' scores to the states and institutions;
- f. What was the nature and extent of ETS's error in scoring the Praxis tests;
- g. What audit procedures were in place to detect incorrect scoring;
- h. Why the auditing procedures failed to timely detect the incorrect scoring prior to reporting;

- i. Why ETS first believed the lower scores for the short essay were not attributed to scoring errors;
- j. Whether ETS breached contracts with Plaintiffs and Class members;
- k. Whether the contract between ETS and the Plaintiffs and Class members is a contract of adhesion;
- l. Whether ETS owed duties to Plaintiffs and Class members which were independent of any of its contractual duties;
- m. Whether ETS was negligent;
- n. Whether ETS was guilty of negligent misrepresentation;
- o. Whether ETS timely discovered its errors;
- p. Whether ETS informed Plaintiffs and Class members of its scoring error in a timely fashion;
- q. What measures ETS undertook to determine and identify all those whose scores were impacted by the scoring errors;
- r. Whether ETS has identified all putative Class members;
- s. Whether the scoring errors involved an equating or anchor question;
- t. If the scoring errors involved an equating or anchor question, whether ETS's identification of those affected was proper;
- u. Whether the steps taken to remedy the scoring errors were appropriate and thorough; and
- v. Whether ETS is legally liable for damages to Plaintiffs and Class members.

52. The questions of law and fact common to the Class predominate over any questions that may affect only individual members.

53. The claims of Plaintiffs are typical of the claims of all other Class members because Plaintiffs took the Praxis test, were falsely told that they had failed the exam when in actuality they had passed it or were given test scores lower than actually earned, and were injured by defendant's conduct. Thus, Plaintiffs' claims are based upon the same set of facts, and assert the same legal theories to recover damages.

54. Plaintiffs will fairly and adequately protect the interests of the Class. There are no disabling conflicts of interest between Plaintiffs and the Class. Plaintiffs are members of the Class, possess the same interests, and suffered the same injuries as the Class members, making their interests coextensive with those of all other Class members.

55. The Class is represented by experienced counsel well-qualified to handle this case and represent the interest of the Class. By Order dated January 24, 2005, the Court appointed Dawn M. Barrios of the firm Barrios, Kingsdorf & Casteix, LLP as Plaintiffs' Lead Counsel, and Richard J. Arsenault of the firm Neblett, Beard & Arsenault as Plaintiffs' Liaison Counsel. By Order entered on February 15, 2005, the Court appointed the following lawyers to serve on Plaintiffs' Steering Committee: Richard J. Arsenault, Neblett, Beard & Arsenault, 2020 Bonaventure Court, PO Box 1190, Alexandria, Louisiana, 71309; Dawn M. Barrios, Barrios, Kingsdorf, and Casteix, LLP, One Shell Square, 701 Poydras Street - Suite 3650, New Orleans, Louisiana, 70139; Sherrie R. Savett, Berger & Montague, P.C., 1622 Locust Street, Philadelphia, Pennsylvania, 19103; Philip Bohrer, The Bohrer Law Firm, 8712 Jefferson Highway - Suite B, Baton Rouge, Louisiana, 70809; Phyllis E. Brown, Law Offices of Phyllis E. Brown, 119 East Court Street, Cincinnati, Ohio, 45202; Joseph

Bruno, Bruno & Bruno, LLP, 855 Baronne Street, New Orleans, Louisiana, 70113; and Walter J. Leger, Leger & Mestayer, 600 Carondelet Street, New Orleans, Louisiana, 70130. These firms have extensive experience in complex litigation, particularly class actions, and the resources to prosecute this case through to its conclusion.

56. A class action is superior to other methods for the fair and efficient adjudication of the controversy for reasons that include the following:

a. The prosecution of separate actions by individual members of the Class creates a risk of inconsistent and varying adjudications with respect to members of the Class that would establish incompatible standards of conduct for defendant;

b. Questions of law and fact common to the members of the Class predominate over any questions affecting only individual members, and prosecution as a class action will eliminate the possibility of duplicative litigation; and

c. A class action will provide redress for claims which otherwise may be too small to support the expense of individual, complex litigation.

57. Plaintiffs know of no difficulties that will be encountered in the management of this litigation that would preclude its maintenance as a class action.

#### **CLASS ACTION ALLEGATIONS RELATING TO ANTITRUST CLAIM**

58. For the antitrust claim, Plaintiffs bring this class action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, individually and on behalf of all members of the Antitrust Class. The Antitrust Class has two subclasses defined as follows:

Subclass A – All persons who failed the Praxis Principles of Learning and Teaching for grades 7 through 12 test administered by ETS during the period of August 2000 through the present, and who purchased a “Diagnostic Preparation Program” from ETS; and

Subclass B – All persons who failed the Praxis Principles of Learning and Teaching for grades 7 through 12 test administered by ETS [during the period of August 2000 through the present] and who paid ETS for late registration fees or for early score notification.

59. The Antitrust Class, and each subclass thereof, is so numerous that joinder of all members is impracticable, with potential claimants in the thousands. The exact number and identities of the members of the Antitrust Class and each subclass are currently unknown to Plaintiffs but are known by ETS and can be easily ascertained.

60. Antitrust Plaintiffs seek through injunctive relief the following: (1) the ability to obtain their Praxis tests and test results to evaluate their test performance when it is necessary to retake the Praxis test; and (2) the ability to re-register for a consecutive Praxis test without payment of a late registration fee.

61. Antitrust Plaintiffs also seek compensatory damages of refund of the charges for Diagnostic Preparatory Programs purchased, charges as late fees, and charges for early notification.

62. There are questions of law and fact common to the Antitrust Class. The most significant common questions to the Antitrust Class, which predominate over all other issues present in this case, are:

a. Whether ETS has engaged in conduct which gives rise to liability to the Antitrust Class under the federal antitrust laws;

b. Whether ETS possesses monopoly power within the Relevant Market for the Antitrust Class;

c. Whether ETS acquired, maintained or leveraged monopoly power within the Relevant Market for the Antitrust Class through anti-competitive and/or unlawful activity;

d. Whether ETS's unlawful conduct has caused legally cognizable injury to the Antitrust Class members by increasing the prices that class members have paid above competitive levels; and

e. The nature and extent of injunctive relief available to each Antitrust Class member to remedy the effects of ETS's unlawful conduct.

63. The questions of law and fact common to the Antitrust Class predominate over any questions that may affect only individual members.

64. The claims of Antitrust Class Plaintiffs are typical of the claims of all other Antitrust Class members because they and other Antitrust Class members were injured in the same manner by defendant ETS's conduct, including ETS charges for Diagnostic Preparatory Program evaluations while refusing to return to Antitrust Class members copies of their answers or questions, and ETS timing its release of test scores to force Antitrust Class members to pay late fees and/or early notification fees. All Antitrust Class members seek the same remedy of compensatory damages and injunctive relief.

65. Plaintiffs will fairly and adequately protect the interests of the Antitrust Class. There are no disabling conflicts of interest between Plaintiffs and the Antitrust Class. Plaintiffs are members of the Antitrust Class, possess the same interests, and suffered the same injuries as the Antitrust Class members, making their interests coextensive with those of the Antitrust Class.

66. The Antitrust Class is represented by experienced counsel well-qualified to handle this case. By Order dated January 24, 2005, the Court appointed Dawn M. Barrios of the firm Barrios, Kingsdorf & Casteix, LLP as Plaintiffs' Lead Counsel, and Richard J. Arsenault of the firm Neblett, Beard & Arsenault as Plaintiffs' Liaison Counsel. By Order entered on February 15, 2005, the Court appointed the following lawyers to serve on Plaintiffs' Steering Committee: Richard J. Arsenault, Neblett, Beard & Arsenault, 2020 Bonaventure Court, PO Box 1190, Alexandria, Louisiana, 71309; Dawn M. Barrios, Barrios, Kingsdorf, and Casteix, LLP, One Shell Square, 701 Poydras Street - Suite 3650, New Orleans, Louisiana, 70139; Philip Bohrer, The Bohrer Law Firm, 8712 Jefferson Highway - Suite B, Baton Rouge, Louisiana, 70809; Phyllis E. Brown, Law Offices of Phyllis E. Brown, 119 East Court Street, Cincinnati, Ohio, 45202; Joseph Bruno, Bruno & Bruno, LLP, 855 Baronne Street, New Orleans, Louisiana, 70113; Walter J. Leger, Leger & Mestayer, 600 Carondelet Street, New Orleans, Louisiana, 70130; and Sherrie R. Savett, Berger & Montague, P.C., 1622 Locust Street, Philadelphia, Pennsylvania, 19103. These firms have the experience in complex litigation, particularly class actions, and the resources to prosecute this case through to its conclusion.

67. A class action is superior to other methods for the fair and efficient adjudication of the controversy for reasons that include the following:

a. The prosecution of separate actions by individual members of the Antitrust Class creates a risk of inconsistent and varying adjudications with respect to members of the Antitrust Class that would establish incompatible standards of conduct for ETS;

b. Questions of law and fact common to the members of the Antitrust Class predominate over any questions affecting only individual members, and prosecution as a class action will eliminate the possibility of duplicative litigation; and

c. A class action will provide redress for claims which otherwise would be too small to support the expense of individual, complex litigation.

68. The determination of fault, the appropriateness of damages and injunctive relief, and the bases for determining the amount of compensatory damages may be made in the class action without the necessity of proof at the time as to the quantum for individual plaintiffs, thereby establishing guidelines for settlement and/or subsequent trials in individual cases if necessary.

69. Plaintiffs know of no difficulties that will be encountered in the management of this litigation that would preclude its maintenance as a class action.

#### **COUNT I - BREACH OF CONTRACT**

70. The foregoing paragraphs are incorporated as if fully set forth herein.

71. By submitting applications and fees to ETS in connection with taking the Praxis test, Plaintiffs and Class members entered into contracts with ETS.

72. The contracts contained expressed or implied provisions that ETS would correctly score the tests and provide test takers, their states and institutions with their correct scores.

73. ETS breached its contracts when it incorrectly scored the Praxis tests taken by Plaintiffs and the Class.

74. As a result of ETS's breach, Plaintiffs and Class members suffered damages as described herein.

75. The damages suffered by Plaintiffs and Class members were the natural and foreseeable consequences of ETS's conduct.

### **COUNT II - NEGLIGENCE**

76. The foregoing paragraphs are incorporated as if fully set forth herein.

77. ETS owed Plaintiffs and Class members duties which it breached.

78. Independent of any contractual obligation ETS had to Plaintiffs and Class members to properly score the Praxis, ETS also had a duty timely to identify errors in scoring prior to the reporting of scores.

79. ETS's actions were negligent, grossly and flagrantly negligent, reckless and malicious, rendering ETS liable and/or strictly liable, for the following reasons:

- a. Failing to hire competent persons to grade the Praxis examinations;
- b. Failing to properly train its employees or independent contractors on the correct methods of scoring;
- c. Failing to properly score and scale the Praxis examinations;
- d. Failing on each test to properly conduct an item analysis against both other test questions and prior tests for each of the nine administrations to discover scoring errors before reporting individual scores;
- e. Failing to properly identify all persons adversely affected by the scoring errors;
- f. Failing to properly re-score the examinations upon requests and payments to ETS by Plaintiffs and Class members to re-score the examinations;

g. Failing immediately to notify Plaintiffs, Class members, and state educational authorities of the incorrect scoring or even the possibility of incorrect scoring;

h. Failing timely to implement effective audit or quality control procedures under which the examination scores were examined and determined to be accurate before reporting individual scores;

i. Failing timely to recognize that the lower scores were due to scoring errors;

j. Failing to implement appropriate procedures to prevent scoring errors or inaccuracies; and

k. Any and all other acts of negligence, recklessness, and omissions to be proven through discovery or at the time of trial of this matter, all of which were in contravention of the duties imposed by law on ETS in favor of Plaintiffs and Class members.

80. As a result of ETS's breach of its legal duties, Plaintiffs and Class members suffered damages as described herein.

81. The damages suffered by Plaintiffs and Class members were all general and special damages arising from the natural and foreseeable consequences of ETS's conduct.

### **COUNT III - NEGLIGENT MISREPRESENTATION**

82. The foregoing paragraphs are incorporated as if fully set forth herein.

83. ETS owed Plaintiffs and Class members the duty to provide them, the state educational authorities designated by Plaintiffs and Class members as score recipients, and their educational institutions accurate scores on the Praxis exam.

84. ETS negligently misrepresented to Plaintiffs and Class members (and others) that they had failed the exams when, in fact, they had passed.

85. ETS also negligently misrepresented to Plaintiffs and Class members (and others) that they had lower Praxis scores than they had achieved.

86. ETS also negligently misrepresented to the state educational authorities and educational institutions, designated by Plaintiffs and Class members as score recipients, that Plaintiffs and Class members had failed the exams when, in fact, they had passed.

87. ETS also negligently misrepresented to the state educational authorities and their educational institutions, designated by Plaintiffs and Class members as score recipients, that Plaintiffs and Class members had received lower Praxis scores than they had actually achieved.

88. ETS also negligently misrepresented that it had procedures in place to ensure its correct scoring of the exams and to ensure that, if scoring errors occur, they will be detected promptly, and will not reoccur.

89. On ETS's website, under the heading of "Commitment to Fairness and Equity in Testing," ETS states: "[T]he ETS Office of Corporate Quality Assurance conducts periodic audits of each ETS testing program to ensure adherence to the ETS Standards of Quality and Fairness."

90. ETS represents to the public and to test takers that scores will be accurately reported.

91. Under the heading of "Statisticians and Psychometricians," ETS represents on its website: "Reliability assures that test takers will receive similar scores no matter which version of an ETS test they take . . . . Our standards for test performance, maintained by exacting statistical and psychometric research, are the most rigorous in the field." In an ETS marketing pamphlet entitled "Questions to Ask about Teacher Testing Programs," ETS represents: "Test reliability is established and monitored through test development and statistical processes."

92. ETS breached its duty when it made the above representations and failed to implement or use appropriate procedures to insure the correct scoring and to prevent or detect scoring errors.

93. ETS provided scores on the Praxis exam for the benefit [and guidance] of Plaintiffs and Class members.

94. Plaintiffs and Class members justifiably relied upon ETS's false scoring of the Praxis exam and they erroneously believed that they had failed the exam when, in fact, they had passed.

95. The state educational authorities, designated by Plaintiffs and Class members as score recipients, justifiably relied upon ETS's false scoring of the Praxis exam. These educational authorities erroneously believed that Plaintiffs and Class members failed the exam when, in fact, they had passed. As a result of the incorrect reporting of the grades, the state authorities did not issue teacher certifications to them.

96. As a result of ETS's negligent misrepresentation, Plaintiffs and Class members suffered damages as described herein.

97. The damages suffered by Plaintiffs and Class members were all general and specific damages arising from the natural and foreseeable consequences of ETS's conduct.

#### **COUNT IV - VIOLATION OF §2 OF THE SHERMAN ACT**

98. The foregoing paragraphs are incorporated as if fully set forth herein.

99. ETS possesses monopoly power in the market for Praxis testing. Through the anti-competitive conduct described herein, ETS has willfully maintained its monopoly power in this market. ETS has acted with an intent to illegally maintain its monopoly power, and its anti-competitive conduct has enabled it do so, in violation of Section 2 of the Sherman Act.

100. ETS has unlawfully leveraged its monopoly power in the Praxis testing market, to gain a competitive advantage in the market for Praxis training and review, in violation of Section 2 of the Sherman Act.

101. As a result of the violation of Section 2 of the Sherman Act, Antitrust Class members have been injured in their business and their property.

102. The unlawful monopolization and the effects thereof are continuing and will continue unless the injunctive relief sought by plaintiffs is granted. Plaintiffs have no adequate remedy at law.

103. Antitrust Plaintiffs seek through injunctive relief the following: (1) the ability to obtain their Praxis tests and test results to evaluate their test performance when it is necessary to retake the Praxis test; and (2) the ability to re-register for a consecutive Praxis test without payment of a late registration fee.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, respectfully request that the Court enter judgment in favor of Plaintiffs and all other Class members and against Defendant ETS, and award the following relief:

- a. Grant certification of the proposed Class for the claims of breach of contract, negligence, negligent misrepresentation, and appoint appropriate representatives of this Class;
- b. Grant certification of the proposed Antitrust Class, and appoint appropriate representatives of this Class;
- c. Determine Defendant's liability for damages;
- d. Determine the scope of damages suffered by all Plaintiffs and Class members;

e. Award threefold the damages the Antitrust Class members have sustained and will sustain as a result of the federal antitrust violations alleged herein;

f. Award injunctive relief to the Antitrust Class, enjoining ETS and its agents and employees from continuing their unlawful acts set forth herein, including the failure to provide Antitrust Class members with tests and test results so that they could evaluate their prior test performances, and forcing them to pay late registration fees when registering for a consecutive Praxis exam;

g. Award punitive damages where legally appropriate;

h. Award prejudgment and post-judgment interest on all damages as allowed by law;

i. From a common fund created, award attorneys' fees, expert fees and all costs and expenses incurred in the prosecution of this action as allowed by law; and

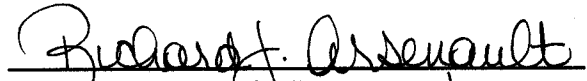
j. Grant such additional or different relief as the interests of justice, law or equity may require.

**JURY TRIAL DEMANDED**

Plaintiffs, on behalf of themselves and all others similarly situated, demand a trial by jury.

Dated: March 10, 2005

Respectfully Submitted,



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**PLAINTIFFS' LEAD COUNSEL**

  
with permission

## **EXHIBIT A**

### **Cases Originally Transferred to MDL:**

#### **Eastern District of Louisiana**

*Lois Adams, et al. v. Educational Testing Service*, C.A. No. 2:04-1997

*Christal Aguillard, et al. v. Educational Testing Service*, C.A. No. 2:04-2122

*James Johnson v. Educational Testing Service*, C.A. No. 2:04-2291

*Rolanda Thigpen v. Educational Testing Service*, C.A. No. 2:04-2305

#### **Middle District of Louisiana**

*Steven G. Miller v. Educational Testing Service, et al*, C.A. No. 3:04-563

#### **Western District of Louisiana**

*Shawn M. Gary, et al. v. Educational Testing Service*, C.A. No. 2:04-1583

*Ian Cohen et al. v. Educational Testing Service, Inc.*, C.A. No. 2:04-1686

#### **Northern District of Ohio**

*Katherine J. Brouse v. Educational Testing Service*, C.A. No. 1:04-1599

*Janet Riehle v. Educational Testing Service*, C.A. No. 3:-4-7430

#### **Southern District of Ohio**

*Paul A. Perrea, et al. v. Educational Testing Service*, C.A. No. 1:04-492

#### **Eastern District of Pennsylvania**

*Eric Rutledge, et al. v. Educational Testing Service*, C.A. No. 2:04-3465

*Michelle T. Kochensky v. Educational Testing Service*, C.A. No. 2:04-3794

*Raffael M. Billet v. Educational Testing Service*, C.A. No. 2:0403785

### **Cases Considered “Tag-Along Actions” in the MDL:**

Eastern District of Kentucky

*Sarah Hash v. Educational Testing Service, Inc.*, C.A. No.7:04-359

**Western District of Kentucky**

*Joan Beckwith, et al. v. Educational Testing Service, Inc.*, C.A. No. 3:04-534

**Middle District of Louisiana**

*Paul Vidrine v. Educational Testing Service, Inc.*, C.A. No. 3:04-574

*Damon Rachal v. Educational Testing Service, Inc.*, C.A. No. 3:04-687

**Western District of Louisiana**

*Lurlene Stratton, et al. v. Educational Testing Service, Inc.*, C.A. No. 3:04-1914

**Southern District of Mississippi**

*Laura Bass, et al. v. Educational Testing Service, Inc.*, C.A. No. 3:04-726

**New Jersey**

*Traman LaDon Thibodeaux v. Educational Testing Service, Inc.*, C.A. No. 3:04-3957

*Danielle Wainwright v. Educational Testing Service, Inc.*, C.A. No. 3:04-4299

**Northern District of Ohio**

*Sheila Dorris v. Educational Testing Service, Inc.*, C.A. No. 1:04-1887

*Melissa Wilthew v. Educational Testing Service, Inc.*, C.A. No. 4:04-2319

**Middle District of Tennessee**

*Andra M. Bullock, et al. v. Educational Testing Service, Inc.*, C.A. No. 1:04-107

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing pleading has been served upon all counsel of record by placing a copy of same, properly addressed, in the U. S. Mail on this 10<sup>th</sup> day of March, 2005.

  
**DAWN M. BARRIOS**